

NON-BINDING ARBITRATION

**PURSUANT TO:
FINAL SETTLEMENT STIPULATION**

Kansas v. Nebraska and Colorado
No. 126, Original, U.S. Supreme Court
Decree of May 19, 2003, 538 U.S. 720

ARBITRATOR'S FINAL DECISION ON LEGAL ISSUES

January 22, 2009

BACKGROUND

On December 15, 2002, the states of Kansas, Nebraska, and Colorado (the “States”) executed the Final Settlement Stipulation (the “FSS”) “... to resolve the currently pending litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment” FSS, Volume 1 of 5, at 1. The FSS was filed with the Special Master appointed by the U.S. Supreme Court (the “Court”) in *Kansas v. Nebraska and Colorado*, No. 126, Original, who recommended entry of the proposed consent judgment which would approve the FSS. Second Report of the Special Master (Subject: Final Settlement Stipulation) at 77. On May 19, 2003, the Court entered a consent decree approving the FSS (the “Consent Decree”).

By 2007, disputes arose between the States regarding compliance with the FSS and the Republican River Compact (the “Compact”). The disputes were submitted to the Republican River Compact Administration (the “RRCA”) pursuant to the provision in the FSS for dispute resolution. *See* FSS, Volume 1 of 5, § VII., at 34-40. The RRCA addressed the disputes, but no resolution of certain disputes was reached. *See* Resolution of the RRCA dated May 16, 2008, Exhibit 1 to Arbitration Agreement dated October 23, 2008. The RRCA submitted these disputes to non-binding arbitration pursuant to the provisions of § VII. of the FSS, the States executed the Arbitration Agreement on October 23, 2008 (the “Arbitration Agreement”), and I was retained by the States to serve as the Arbitrator.

Exhibit 2 to the Arbitration Agreement sets forth the “Time Frame Designation” for the non-binding arbitration, Exhibit 3 to the Arbitration Agreement sets forth the disputed issues identified by the State of Kansas to be arbitrated, and Exhibit 4 to the Arbitration Agreement sets forth the disputed issues identified by the State of Nebraska to be arbitrated. The disputed issue originally raised by the State of Colorado with the RRCA, which the RRCA submitted to non-binding arbitration pursuant to the provisions of § VII. of the FSS (*See* Attachment 3 to Resolution of the RRCA dated May 16, 2008), has been withdrawn from this non-binding arbitration and is not included in the Arbitration Agreement.

From the issues set forth in Exhibit 3 and Exhibit 4 to the Arbitration Agreement, the States identified six legal issues to be decided by the Arbitrator by December 19, 2008, for the purpose of narrowing discovery and the hearing on the merits scheduled in mid-March of 2009. Based on a disagreement regarding the appropriate scope of the arbitration, the Arbitrator identified a seventh legal issue during a prehearing conference held telephonically on November 5, 2008. Each of the States filed opening briefs on these seven legal issues with the Arbitrator on November 10, 2008. (The State of Colorado briefed 3 arguments pertaining to only 4 of the legal issues.) Responsive briefs were filed on November 24, 2008, and reply briefs were filed on December 5, 2008. Oral argument on these legal issues was heard at the University of Denver, Strum College of Law, on December 10, 2008.

Each of the States stated the seven legal issues differently, and the Arbitrator has synthesized the statements of the States into the following seven questions. References to the argument or issue are from the opening briefs of each of the States.

Question 1: Are Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures proper subjects of dispute resolution and for this arbitration?

(Kansas' Argument A., Nebraska's Issue I.A., Colorado's Argument I.)

Question 2: Is the evaporation from Non-Federal Reservoirs below Harlan County Lake required to be included in the Compact accounting?

(Kansas' Argument B., Nebraska's Issue I.B.)

Question 3: Do the current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation? If yes, how should evaporation from Harlan County Lake be allocated?

(Kansas' Argument C., Nebraska's Issue I.C.)

Question 4: If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas?

(Kansas' Argument D., Nebraska's Issue III.B., Colorado's Argument II.)

Question 5: Is Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation a proper subject for this arbitration, and can the U.S. Supreme Court formulate and mandate a remedy for future compliance?

(Kansas' Argument E., Nebraska's Issue II., Colorado's Argument III.)

Question 6: If Nebraska's alleged violations during both 2005 and 2006 are substantiated, is Kansas entitled to damages for both 2005 and 2006 or for 2006 only?

(Kansas' Argument F., Nebraska's Issue III.A.1.)

Question 7: Is Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years a proper subject for this arbitration?

(Kansas' Argument G., Nebraska's Issue III.A.2., Colorado's Argument I.)

FINAL DECISION

The Arbitrator has treated the briefs filed by the States as being analogous to cross-motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. “A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.” Fed. R. Civ. P. 56(a). “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

The Arbitrator has carefully considered the briefs of counsel for the States and has determined that there are no material facts genuinely at issue that would preclude decision of the seven legal issues set forth above as a matter of law. Therefore, the Arbitrator issues this decision on these seven legal issues, including a summary of his reasons for deciding each issue and supporting analysis. With minor corrections and the addition of supporting analysis for each of the seven issues, this decision is materially the same as the preliminary decision issued by the Arbitrator on December 19, 2008.

Question 1:

Are Nebraska’s proposed changes to the Republican River Compact Administration Accounting Procedures proper subjects of dispute resolution and for this arbitration?

(Kansas’ Argument A., Nebraska’s Issue I.A., Colorado’s Argument I.)

Decision: Nebraska’s proposed changes to the Republican River Compact Administration Accounting Procedures are proper subjects of dispute resolution and for this arbitration. If any changes to the Accounting Procedures are determined to be warranted, the appropriate effective date for such changes will be determined following a hearing of the facts. Finding for Nebraska and Colorado; finding against Kansas.

Summary of Reasoning. The “equitable division” or “allocation” of the waters of the Republican River Basin between the States is set forth in Article IV of the Compact, subject to the proportionate adjustment required in Article III. This equitable division or allocation is the paramount reason for the Compact and cannot be enforced without accurate accounting of how the waters are actually distributed between the States. Significant flaws in accounting will result in significant differences between the enforceable allocations established in the Compact and the actual distributions of the waters between the States. Correcting errors in the Accounting Procedures used by the RRCA will help assure that the States actually receive the waters to which they are entitled pursuant to the Compact. Correcting such errors will not change the allocations set forth in the Compact, which cannot be changed unless the Compact is amended. Since the Court has jurisdiction to enforce the distribution of waters pursuant to the Compact, it must also have jurisdiction to require application of accurate accounting procedures used to determine whether the distribution of the waters as required by the Compact has in fact occurred.

The Compact contains no explicit accounting procedures, but the FSS, which must be construed such that it is entirely consistent with the Compact, does provide detailed accounting procedures to be used by the RRCA (the “RRCA Accounting Procedures”). The FSS provides that: “The RRCA may modify the RRCA Accounting Procedures, or any portion thereof, in any manner consistent with the Compact and this Stipulation.” *See* FSS, § I.F. *See also* RRCA Accounting Procedures and Reporting Requirements, § I. The FSS also sets forth a process for dispute resolution in a separate section. *See* FSS, § VII. This section of the FSS clearly states that the dispute resolution process applies to “Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest” *See* FSS, § VII.A., ¶ 1. and ¶ 7. The scope of “Any matter relating to Republican River Compact Administration ...” is broad and includes accounting procedures used to determine compliance with the Compact, unless such procedures are specifically excluded. The specific provisions for dispute resolution in the FSS do not exclude the RRCA Accounting Procedures. Similarly, the provisions in the FSS affirming that the RRCA may modify the RRCA Accounting Procedures do not specifically exclude disputes involving those procedures from the provisions in the FSS for dispute resolution.

Because the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA, pursuant to Article IX of the Compact, unanimously adopted by the official in each State charged with the duty of administering the Compact, which duty is exclusively reserved to those officials in Article IX. Through § VII. of the FSS, the rules and regulations of the RRCA include provision for dispute resolution involving “Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest” (FSS, § VII.A., ¶ 1.) and “any dispute submitted to the RRCA pursuant to this Section VII.” FSS, § VII.A., ¶ 7.

Analysis. The Republican River Compact begins by stating in Article I:

The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the “Basin”) for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity;

Republican River Compact, Pub. Law No. 78-60, 57 Stat. 86 (1943); codified at § 82a-518, K.S.A. (2007); App. § 1-106, 2A N.R.S. (1995); and § 37-67-101 C.R.S. (2008).

The “equitable division of such waters” is set forth in Article IV of the Compact, subject to the proportionate adjustment required in Article III.¹ This equitable division cannot be provided without accurate accounting of the waters so divided. Significant flaws in accounting will result in significant differences between the equitable division of the waters established in the Compact

¹ “Should the future computed virgin water supply of any source vary more than the [*sic*] (10) percent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportions that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.” Article III, 82a-518, K.S.A. (2007).

and the actual distributions of the waters between the States. However, the Compact contains no explicit agreement or methodology for accounting procedures, but instead Article IX provides that:

It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

Id.

The FSS does include explicit, detailed RRCA Accounting Procedures² that although an integral part of the FSS approved and adopted by the Court through its decree dated May 19, 2003 (“Decree”), must also be “rules and regulations” adopted pursuant to Article IX of the Compact: “Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.” *Id.* The reason why the FSS must also be “rules and regulations” adopted pursuant to Article IX of the Compact is because the FSS specifies how the RRCA is to determine compliance with the Compact and requires that the RRCA Accounting Procedures “... shall be used to determine supply, allocations, use and compliance with the Compact according to the Stipulation.” FSS, Volume 1 of 5, App. C, § I., at C6. The Special Master appointed by the Court in *Kansas v. Nebraska and Colorado*, No. 126, Original (“Special Master McKusick”), recognized that the FSS embodied rules and regulations adopted pursuant to Article IX of the Compact when he described the FSS as including “Rules for the use and administration of water above Guide Rock, Nebraska ...”³ since such rules can only be adopted pursuant to Article IX of the Compact.

Although the Court approved the FSS in its Decree, the FSS did not fix the RRCA Accounting Procedures in perpetuity. Under the Compact, rules and regulations consistent with the Compact can be adopted by unanimous action, and under the Compact those rules and regulations can certainly be changed by unanimous action. This is reflected in § I.F. of the FSS, which states: “The RRCA may modify the RRCA Accounting Procedures, or any portion thereof, in any manner consistent with the Compact and this Stipulation.”

Kansas argues that: “Both the FSS, by its plain terms, and the Supreme Court’s own pronouncements regarding the nature of its original jurisdiction, preclude the Court, and thus, by extension, an arbitrator, from passing on Nebraska’s proposed changes to the accounting procedures in the FSS.” Kansas’ Opening Brief on Threshold Legal Issues at 7. Kansas seems to view changing the RRCA Accounting Procedures, absent unanimous action by the States, as one in the same with “modification or augmentation of the FSS”. *Id.*, at 8. The FSS is an agreement between and among the States and with the Court’s approval, the FSS is also a decree

² Final Settlement Stipulation, Volume 1 of 5, Appendix C.

³ See Second Report of the Special Master (Subject: Final Settlement Stipulation), ¶ (d), at 28.

of the Court and can only be modified as provided for by the FSS itself or by action of the Court. Kansas' interpretation that changing the RRCA Accounting Procedures, absent unanimous action by the States, is the same as "modification or augmentation of the FSS" cannot be correct since the FSS explicitly provides for dispute resolution for: "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest," FSS, § VII.A., ¶ 1. The term "Compact administration" clearly includes accounting procedures used to determine compliance with the Compact,⁴ and the phrase "Any matter relating to Republican River Compact administration ..." is broad and inclusive. Since disputed matters relating to the RRCA Accounting Procedures are not explicitly excluded in the FSS, they should be considered disputed matters subject to the dispute resolution process set forth in § VII. of the FSS, including submittal of any disputed matter to non-binding arbitration pursuant to § VII.B. once a State has first submitted the disputed matter to the RRCA pursuant to § VII.A. and the disputed matter cannot be resolved by RRCA within the timeframes set forth in § VII.A.

This broad presumption that disputed matters not resolved by the RRCA pursuant to § VII.A. may be submitted to non-binding arbitration, unless specifically excluded from arbitration, is consistent with the Court's explanation that:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steel Workers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, at 582-583.

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Id., at 584-585.

To conclude otherwise would mean that the Court is powerless to consider accounting procedures "... used to determine supply, allocations, use and compliance with the Compact ..." when any one of the States only has to refuse to consider changes to the accounting procedures that may be warranted. FSS, App. C, § I., at C6.

Regarding the Supreme Court's pronouncements concerning the nature of its original jurisdiction, Kansas cites to *Texas v. New Mexico*, 462 U.S. 554 (1983). In addition to Texas seeking a decree from the Court commanding New Mexico to deliver water in accordance with the Pecos River Compact (*Id.*, at 562), Texas sought adoption of what it called a "Double Mass Analysis" as the method for determining when a shortfall in state-line flows has occurred. *Id.*, at 571. On the latter, the Court declined stating:

⁴ *Id.*, at 27-28.

The “Double Mass Analysis” represents a sharply different approach to how to go about measuring shortfalls at the state line, an approach which the Compact leaves the Commission free to adopt, but which this Court may not apply against New Mexico in the absence of Commission action.

Id., at 574.

However, the reason the Court declined to impose the “Double Mass Analysis” sought by Texas was not because the Court determined that it lacked authority to review accounting methodology, as suggested by Kansas, but because the Pecos River Compact itself specified the method for determining when a shortfall in state-line flows has occurred.⁵ *Id.*, at 571-572. The Court further concluded that:

... the “Double Mass Analysis” is not close enough to what the Compact terms an “inflow-outflow method, as described in the Report of the Engineering Advisory Committee” to make it acceptable for use in determining New Mexico’s compliance with its Art. III obligations.

Id., at 574.

The Republican River Compact has no such specificity in accounting methodologies or procedures. And if in this instance, as suggested by Kansas, the Court has no authority to resolve disputes regarding accounting procedures to ensure that accurate accounting is performed, then the Court cannot determine whether the apportionment of the waters of the Republican River Basin as set forth in Article IV of the Compact has accurately been made.

Special Master McKusick recognized the importance of accurate accounting procedures in determining the allocation of the waters of the Republican River Basin when he stated in his second report that:

The importance of the States’ collaboration in developing the more comprehensive RRCA Accounting Procedures cannot be overemphasized. Had the States not reached a final settlement and instead fully litigated their claims, accounting methods would of necessity (and with great delay and expense) have had to be determined as part of the trial for the purpose of establishing a methodology for determining water allocation and consumptive use figures for years after 1994.

Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Original, at 48.

⁵ Citing Article III of the Pecos River Compact:

“(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.”

Question 2:

Is the evaporation from Non-Federal Reservoirs below Harlan County Lake required to be included in the Compact accounting?

(Kansas' Argument B., Nebraska's Issue I.B.)

Decision: The evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Finding for Kansas; finding against Nebraska.

Summary of Reasoning. In § VI.A., the FSS affirmatively provides that: “For purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures.” The provision is silent about how or whether evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Nebraska asserts that this provision should be read that because it includes evaporation from Non-Federal Reservoirs above Harlan County Lake, it implies exclusion of evaporation from Non-Federal Reservoirs below Harlan County Lake. However, the FSS must be read such that it is entirely consistent with the Compact. To be entirely consistent with Article II of the Compact, which defines “Beneficial Consumptive Use” as including “water consumed by evaporation from **any** reservoir” [*emphasis added*], § VI.A. of the FSS can not mean that evaporation from Non-Federal Reservoirs below Harlan County Lake is to be excluded in Compact accounting. Rather, § VI.A. of the FSS simply does not provide a specific requirement as to **how** evaporation from Non-Federal Reservoirs below Harlan County Lake is to be included in the Compact accounting [*emphasis added*]. Regarding the exclusion of reservoirs having a storage capacity of less than 15 acre-feet, this can only be consistent with Article II of the Compact because the evaporation from such small reservoirs is *de minimus*.

Analysis. In its Opening Brief, Kansas asserts that evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Kansas' Opening Brief on Threshold Legal Issues at 13. Nebraska asserts that such evaporation should not be included in the Compact accounting. Nebraska's Opening Brief Re: Legal Issues at 58.

Section VI.A. of the FSS requires that:

For the purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures.

Nebraska reads this provision to mean that evaporation from Non-Federal Reservoirs located downstream from Harlan County Lake should not be included in the Compact accounting stating that: “No provision is made for non-federal reservoirs below Harlan County Lake and none can be imputed.” Nebraska's Opening Brief Re: Legal Issues at 58. In its responsive brief, Nebraska similarly contends: “... that by expressing an intent to include Non-Federal Reservoirs above

Harlan County Lake, the parties intended to exclude those below Harlan County Lake.” Nebraska’s Responsive Brief Re: Legal Issues at 26.

Nebraska further asserts that: “Although the Compact and FSS generally refer to ‘all’ Non-Federal Reservoirs in various contexts, it is clear from the face of the FSS that ‘all’ does not mean ‘all’ because there already is an exclusion for reservoirs of less than 15 acre-feet in capacity.” *Id.*

Kansas offers a different interpretation regarding inclusion of this provision together with a description of the history of including evaporation from Non-Federal Reservoirs located downstream from Harlan County Lake. However, neither is needed to properly decide this issue.

Section I.D. of the FSS provides that:

The States agree that this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States’ respective rights and obligations under the Compact. The States reserve their respective rights under the Compact to raise any issue of Compact interpretation and enforcement in the future.

This provision is an acknowledgement of the legal fact that the FSS cannot operate to change the Compact, which is both a contract between the States and a Federal statute. Article II of the Compact defines “Beneficial Consumptive Use” as follows:

The term “Beneficial Consumptive Use” is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

In § II. of the FSS, the term “Beneficial Consumptive Use” is defined as:

That use by which the Water Supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

The definition for the term “Beneficial Consumptive Use” in § II. of the FSS is wholly consistent with the definition of that term in Article II of the Compact.

Again, § VI.A. of the FSS requires that:

For the purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures.

This provision explicitly applies to Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake. The provision is silent about how or whether evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. However, the only way this provision can be read to be wholly consistent with Article II of the Compact is if Section VI.A. of the FSS does not mean

that evaporation from Non-Federal Reservoirs below Harlan County Lake is to be excluded in Compact accounting. Rather, Section VI.A. of the FSS does not provide a specific requirement as to **how** evaporation from Non-Federal Reservoirs below Harlan County Lake is to be included in the Compact accounting. [*emphasis added*]. Regarding the exclusion of reservoirs having a storage capacity of less than 15 acre-feet, this can only be consistent with Article II of the Compact because the evaporation from such small reservoirs is *de minimus*.

Question 3:

Do the current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation? If yes, how should evaporation from Harlan County Lake be allocated?

(Kansas' Argument C., Nebraska's Issue I.C.)

Decision: The current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation. However, the Accounting Procedures should be modified so that evaporation from Harlan County Lake is allocated between Kansas and Nebraska in proportion to each state's use of water from Harlan County Lake for all purposes. Finding in part for Nebraska and in part for Kansas; finding in part against Kansas and in part against Nebraska.

Summary of Reasoning. In § IV.A.2.e)(1) of the RRCA Accounting Procedures, evaporation from Harlan County Lake is expressly "charged to Kansas and Nebraska in proportion to the annual diversions made by the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District" except "For any year in which no irrigation releases were made from Harlan County Lake" The States could have chosen language that would have expressly apportioned the evaporation losses from Harlan County Lake between Nebraska and Kansas according to the use of water from Harlan County Lake by each state, whatever those uses might lawfully be, but they did not. Assuming Kansas' assertion of the underlying intent to be true, that the States would share the consumptive beneficial use associated with evaporation from Harlan County Lake on the basis of the relative amount of their uses, that intent cannot be used to ignore the plain meaning of the specific language actually adopted by the States. There is no ambiguity in the language of this provision, and its plain meaning must be applied until such time as this provision of the RRCA Accounting Procedures is modified, as it should be, as provided for in the FSS.

There is no dispute that Nebraska paid the Nebraska Bostwick Irrigation District to forgo its use of water from Harlan County Lake in 2006 and that the District did not use water from Harlan County Lake in 2006. By its own admission, Nebraska undertook this action in an effort to comply with the Compact. That is, so that Nebraska could continue beneficial consumptive uses that otherwise may have been subject to curtailment to comply with the Compact. Forgoing

direct use of water from Harlan County Lake so that other uses of water in the Republican River Basin in Nebraska could continue is still a use of water in Nebraska. An apportionment of the evaporation from Harlan County Lake for such uses would be equitable and consistent with Article II and Article XI(a) of the Compact, which impliedly apportions evaporation based on where the associated beneficial use occurs not where the evaporation occurs, and the RRCA Accounting Procedures should be amended to provide this equity and consistency with the Compact when water is used for purposes other than irrigation.

Analysis. The last paragraph in § IV.A.2.e)(1) of the RRCA Accounting Procedures and Reporting Requirements provides that:

The total annual net evaporation (Acre-feet) will be charged to Kansas and Nebraska in proportion to the annual diversions made by the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District during the time period each year when irrigation releases are being made from Harlan County Lake. For any year in which no irrigation releases were made from Harlan County Lake, the annual net evaporation charged to Kansas and Nebraska will be based on the average of the above calculation for the most recent three years in which irrigation releases from Harlan County Lake were made. In the event Nebraska chooses to substitute supply for the Superior Canal from Nebraska's allocation below Guide Rock in Water-Short Year Administration years, the amount of the substitute supply will be included in the calculation of the split as if it had been diverted to the Superior Canal at Guide Rock.

Kansas' Opening Brief on Threshold Legal Issues, Appendix 3, at 23.

In 2006 and 2007, Nebraska reportedly purchased from the Nebraska Bostwick Irrigation District all of the water stored in Harlan County Lake on behalf of the District for the purpose of making it available to Kansas. The Nebraska NRDs reportedly made a similar purchase in 2007 from the Frenchman-Cambridge Irrigation District. *Id.*, at 21; Nebraska's Opening Brief Re: Legal Issues at 56. Kansas states that the intent of the States was to "... share the consumptive beneficial use associated with evaporation from Harlan County Lake on the basis of the relative amount of their uses." Kansas' Opening Brief on Threshold Legal Issues at 22. Consequently, Kansas asserts that "... [an] alternative use by Nebraska should not change the charge of evaporation to Nebraska." *Id.*, at 23. Nebraska counters that the plain language of the RRCA Accounting Procedures quoted above makes it clear that "... when one division of the Bostwick Irrigation District does not divert water, that State's [Nebraska's] share of the evaporation losses from Harlan County Lake is **zero**." Nebraska's Opening Brief Re: Legal Issues at 57.

Kansas's description of the intent of the States to "...share the consumptive beneficial use associated with evaporation from Harlan County Lake on the basis of the relative amount of their uses" is consistent with the last sentence in the last paragraph of § IV.A.2.e)(1) of the RRCA Accounting Procedures and Reporting Requirements which states: "In the event Nebraska chooses to substitute supply for the Superior Canal from Nebraska's allocation below Guide Rock in Water-Short Year Administration years, the amount of the substitute supply will be included in the calculation of the split as if it had been diverted to the Superior Canal at Guide Rock." Kansas' Opening Brief on Threshold Legal Issues, Appendix 3, at 23. It is also reflected in the second sentence in the last paragraph of § IV.A.2.e)(1) of the RRCA Accounting

Procedures which states: “For any year in which no irrigation releases were made from Harlan County Lake, the annual net evaporation charged to Kansas and Nebraska will be based on the average of the above calculation for the most recent three years in which irrigation releases from Harlan County Lake were made.” *Id.* It is worth noting that this second sentence was not originally included in the RRCA Accounting Procedures. *See* last paragraph of FSS, Volume 1 of 5, Appendix C, § IV.A.2.e.1.

Regardless of the intent of the States, the specific wording actually adopted by the States in the last paragraph of § IV.A.2.e)(1) of the RRCA Accounting Procedures is unambiguous and can not be ignored simply because this section “... does not expressly address how evaporation charges are to be allocated if one of the States changes the use of its water to a non-irrigation use.” Kansas’ Opening Brief on Threshold Legal Issues at 21. To address circumstances that were not envisioned when the RRCA Accounting Procedures were adopted, the Accounting Procedures can be changed by unanimous agreement between the States, as was done when the second sentence in the last paragraph of § IV.A.2.e)(1) was added, or pursuant to the dispute resolution process provided for in § VII of the FSS.

By its own admission, Nebraska paid the Nebraska Bostwick Irrigation District to forgo its use of water from Harlan County Lake in 2006 and 2007 “[i]n an effort to comply with the Compact and the FSS.” Nebraska’s Opening Brief Re: Legal Issues at 56. That is, water from Harlan County Lake was not used by the Nebraska Bostwick Irrigation District so that other beneficial consumptive uses could continue in Nebraska that otherwise may have been subject to curtailment to comply with the Compact. Forgoing direct use of water in Nebraska from Harlan County Lake so that other beneficial consumptive uses of water in the Republican River Basin in Nebraska could continue is still a beneficial use of water in Nebraska. An apportionment of the evaporation from Harlan County Lake for such uses would be equitable and consistent with Article II and Article XI(a) of the Compact, which impliedly apportions evaporation based on where the associated beneficial use occurs not where the evaporation occurs⁶, and the RRCA Accounting Procedures should be amended to provide this equity and consistency with the Compact when water is used for purposes other than irrigation.

How evaporation from Harlan County Lake should be equitably apportioned between Kansas and Nebraska when water in Harlan County Lake is being directly used for irrigation purposes in only one of the states but is being used for other purposes by the other state is an accounting issue that is properly addressed in these arbitration proceedings. The issue was submitted to the RRCA for resolution. *See* Arbitration Agreement, Exhibit 1, Attachment 3 (Commissioner Dunnigan’s letter to Commissioners Barfield and Wolfe dated April 15, 2008). The RRCA addressed the issue but no resolution was reached. *See* Arbitration Agreement, Exhibit 1. The issue was identified as an issue to be arbitrated. *See* Arbitration Agreement, Exhibit 3 at 1, and Exhibit 4 at 2.

⁶ Kansas incorrectly asserts that the Compact provisions “require evaporation occurring in a State to be allocated as consumptive beneficial use to that State.” *See* Kansas’ Opening Brief on Threshold Legal Issues at 21.

Question 4:

If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas?

(Kansas' Argument D., Nebraska's Issue III.B., Colorado's Argument II.)

Decision: Under the facts alleged by Kansas, the FSS, as a part of the Consent Decree of May 19, 2003, is properly enforced as a contract, like the Compact itself. Any damages awarded to Kansas are properly limited to the actual damages suffered by Kansas, and evidence pertaining to Nebraska's gains for its alleged overuse of water will not be considered. Finding for Nebraska and Colorado; finding against Kansas.

Summary of Reasoning. The FSS was approved by the Court in the Consent Decree and thus must be construed as part of the Consent Decree. But the FSS is first and foremost an agreement amongst the States, sovereigns who each agreed to "resolve litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment" FSS, § I.A. Because the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA, pursuant to Article IX of the Compact, unanimously adopted by the official in each State charged with the duty of administering the Compact, which duty is exclusively reserved to those officials in Article IX. While the Court clearly has broad power to find contempt and to impose sanctions to remedy violations of its orders and decrees as asserted by Kansas, the Court also has the correlative power to limit or decline to impose contempt sanctions. Given the unique attributes of the FSS (i.e., consent decree, contract between the States, and rules and regulations of the RRCA) and given the purpose of the States in entering into the FSS (i.e., to resolve litigation regarding breach of the Republican River Compact, which itself is to be enforced as a contract between the States), the Arbitrator determines that the FSS as part of the Consent Decree should be enforced as a contract between the States, and any damages awarded to Kansas should be limited to the actual damages suffered by Kansas.

Limiting any damages awarded to Kansas to the actual damages suffered by Kansas is also consistent with the only provision in the FSS itself that provides a remedy for Nebraska's violation of § V.B.2.a. of the FSS, the very violation alleged by Kansas. This remedy, which is set forth in § V.B.2.f. of the FSS, limits Nebraska's compensation (in water) to Kansas in the first year after Water-Short Year Administration is no longer in effect, for Nebraska's exceedance of its annual allocation above Guide Rock in the previous year, to a maximum amount equal to Nebraska's exceedance in the previous year⁷; i.e., Kansas' actual loss.

⁷ "Nebraska must either make up the entire amount of the previous year's Computed Beneficial Use in excess of its Allocation, or the amount of the deficit needed to provide a projected supply in Harlan County Lake of at least 130,000 Acre-feet, whichever is less." FSS, § V.B.2.f.

Analysis. The FSS was executed by the Governors and Attorneys General for each of the States and filed with Special Master McKusick on December 16, 2002. *See Kansas v. Nebraska and Colorado*, No. 126, Original, 538 U.S. 720 (2003). The FSS was subsequently approved by Decree of the Court on May 19, 2003. *Id.* As part of the Consent Decree, the FSS should be construed like a contract.⁸ As part of the Consent Decree, the FSS is also an enforceable decree of the Court.⁹ Additionally, since the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA.¹⁰

Kansas emphasizes the consent decree attribute of the FSS as controlling and asserts that: “The proper mechanism for enforcement of that decree is civil contempt, the goal of which is both to compensate Kansas for its injuries occasioned by Nebraska’s violation and to ensure Nebraska’s future compliance.” Kansas’ Opening Brief on Threshold Legal Issues at 24. As sanctions for civil contempt, Kansas seeks the disgorgement of ill-gotten gains from Nebraska, based on unjust enrichment, together with an additional amount for costs and attorney fees. *Id.*, at 26-30. Kansas further states that it seeks such “money damages as both compensation and as a means to

⁸ “While a consent decree is a judicial pronouncement, it is principally an agreement between the parties and as such should be construed like a contract.” *Crumpton v. Bridgeport Education Assoc.*, 993 F.2d 1023, 1028 (2nd Cir. 1993).

⁹ “A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992).

¹⁰ Article IX of the Compact provides:

It shall be the duty of the three states to administer this compact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

The Compact itself reserves “the duty ... to administer this compact” to “the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies” (collectively the RRCA) including the “adopt[ion of] rules and regulations consistent with the provisions of this compact.” Special Master McKusick recognized the FSS as embodying “rules and regulations” of the RRCA when he described § V of the FSS as “Rules for the use and administration of water above Guide Rock, Nebraska” Second Report of the Special Master (Subject: Final Settlement Stipulation) at 28. The Court’s Consent Decree, which includes the FSS, can not alter or supersede this provision of the Compact.

Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, “congressional consent transforms an interstate compact within this Clause into a law of the United States.” One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms. [*internal citations omitted*]

Texas v. New Mexico, No. 65 Original, 462 U.S. 554, 103 S.Ct. 2558 (1983), at 564.

Thus, for the FSS to govern how the RRCA is to administer and determine compliance with the Compact, the FSS must be construed as rules and regulations unanimously adopted by the three state members of the RRCA.

coerce compliance with the Court's decree. A fine payable to the state of Kansas can serve as both compensation to the state of Kansas and as a means to coerce Nebraska into compliance." Kansas' Reply Brief on Threshold Legal Issues at 25. Kansas cites numerous cases to support its assertions. However, when asked during oral arguments whether Kansas was aware of any case that included a finding of contempt when a consent decree entered as part of an enforcement proceeding for compact compliance was violated, Kansas could not cite to any such case stating "You don't find states doing this."¹¹

Nebraska and Colorado both emphasize the contractual attribute of the FSS as controlling and assert that any damages awarded to Kansas are limited to actual damages suffered by Kansas. See Nebraska's Opening Brief Re: Legal Issues at 60-63; Colorado's Opening Brief on Legal Issues at 11-17.

Clearly, the Court has broad power to find contempt and to impose sanctions to remedy violations of its orders and decrees, as asserted by Kansas. However, the FSS is first and foremost an agreement amongst the sovereign States and must be construed within "its four corners."¹² When asked during oral arguments whether any of the States interpreted the FSS to contain an implied remedy, all three States answered that the FSS did not contain any remedy other than the dispute resolutions in § VII.¹³ However, ¶ f. of § V.B.2., the very section of the FSS that Kansas alleges Nebraska has violated, provides as follows:

¹¹ ARBITRATOR DREHER: I haven't been able to find any case where there was a consent decree entered as part of an enforcement proceeding for compact compliance that then, upon violation, there was ever any sort of contempt. Well, number one, I haven't found that fact pattern anywhere. This -- and this proceeding seems to be unique in that case. Is that fair or not?

MR. DRAPER: That's very fair. That is, I think, a pretty accurate description of the case law as we see it, as we understand it to exist. You don't find states doing this.

Transcript of Proceedings, In re: Non-Binding Arbitration Pursuant to the Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, December 10, 2008, at 67:4-16.

¹² "... the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. ... the instrument must be construed as it is written" *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752 (1991), at 682.

¹³ ARBITRATOR DREHER: Okay. I'm going to ask this as a question and I obviously have my own answer kind of what I'm beginning to formulate. But do any of the States see any implied remedies in the Final Settlement Stipulation?

MR. DRAPER: Well, answering for Kansas first, we don't, we think that this -- this set the standards for compliance in a very detailed way, but in terms of what -- what do you do if a State does not comply with the FSS? We don't see that is in there and that, therefore, has to go to the Supreme Court and you, as the first instance. I'm not -- I don't -- I'm not aware of any guidance that is given in the FSS or the Compact, for that matter.

ARBITRATOR DREHER: Okay. Nebraska?

MR. WILMOTH: I think as far as remedy goes, the dispute resolution process is the remedial provision, if you will, for how you resolve disputes.

If, in the first year after Water-Short Year Administration is no longer in effect, the Compact accounting shows that Nebraska's Computed Beneficial Consumptive Use as calculated above Guide Rock in the previous year exceeded its annual Allocation above Guide Rock, and, for the current year, the expected or actual supply from Harlan County Lake, calculated pursuant to Subsection V.B.1.A., is greater than 119,000 Acre-feet but less than 130,000 Acre-feet, then Nebraska must either make up the entire amount of the previous year's Computed Beneficial Consumptive Use in excess of its Allocation, or the amount of the deficit needed to provide a projected supply in Harlan County Lake of at least 130,000 Acre-feet, whichever is less.

Thus under the clear meaning of its own terms, the FSS provides that the **most** Nebraska is required to provide Kansas in water during the first year after Water-Short Administration is no longer in effect, when in the previous year Nebraska exceeded its annual Allocation above Guide Rock, is an amount equal to the previous year's Computed Beneficial Consumptive Use in excess of Nebraska's Allocation. This amount of water would equal Kansas' actual deficit of water and is the same as Kansas' actual loss. The award of any monetary damages must be consistent with the FSS and equal Kansas' actual loss, not Nebraska's gain. To base a remedy on Nebraska's gain rather than Kansas' actual loss, would impermissibly expand the burdens to which the States committed when they agreed to the terms of the FSS.

Kansas asserts that it should be awarded more than Kansas' actual loss for Nebraska's alleged violations of the FSS "as a means to coerce Nebraska into compliance." See Kansas' Reply Brief on Threshold Legal Issues at 25. After considering Kansas' position, the Arbitrator agrees with the principal expressed by the Special Master in *Kansas v. Colorado*, No. 105, Original. The Special Master in that proceeding cited to *Texas v. New Mexico*:

It might also be said that awarding only a sum of money would permit New Mexico to ignore its obligation to deliver water as long as it is willing to suffer the financial penalty. But in light of the authority to order remedying shortfalls to be made up in kind, with whatever additional sanction might be thought necessary for deliberate failure to perform, that concern is not substantial in our view.

482 U.S. 124, 107 S.Ct. 2279 (1987) at 132.

MR. LAVENE: First administrative step that must be taken and completed before moving on to Supreme Court, if that is what you are getting at, I think, or is there something else?

ARBITRATOR DREHER: There is something else there, but rather than come out with that at this point, I'm just asking the question at this point, I think, to get your perspective.

MR. AMPE: As far as the FSS stating a specific remedy for any type of compact breach, no, it does not. It's analogous to the Court in *Texas versus New Mexico* that the Compact simply does not state any remedies for that.

Transcript of Proceedings, In re: Non-Binding Arbitration Pursuant to the Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, December 10, 2008, at 77:20-79:2.

The Special Master then stated:

I do not see the measure of damages suggested by Kansas as being an effective deterrent to compact violations. Interstate water cases are simply too complex to be guided by the potential form of remedy. And I have no doubt about the power of equity to provide complete relief, perhaps even looking to upstream gain under appropriate circumstances.

Special Master Second Report (September 1997) at 82.

Although *Kansas v. Colorado* involved violations of a compact rather than alleged violation of a consent decree entered by the Court, as Kansas correctly points out, the principal set forth in *Kansas v. Colorado* is valid for interstate water cases generally. Assuming Kansas' allegations to be true, that Nebraska has violated the FSS and future violations of the FSS by Nebraska are likely (*See Kansas' Opening Brief on Threshold Legal Issues* at 31), it is the Arbitrator's opinion that money damages to coerce compliance are less likely to actually result in compliance with the Compact and the FSS than would an effective, operating, compliance plan. Since the latter is also a proper subject for this arbitration (*see* Question 5 below), it is appropriate, at least at this juncture, to enforce the FSS as a contract, like the Compact itself. For the reasons stated above, any damages awarded to Kansas are limited to the actual damages suffered by Kansas.

Question 5:

Is Kansas's proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation a proper subject for this arbitration, and can the U.S. Supreme Court formulate and mandate a remedy for future compliance?

(Kansas' Argument E., Nebraska's Issue II., Colorado's Argument III.)

Decision: Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation is a proper subject for this arbitration; however, Kansas can not mandate its proposed remedy. Any alternative remedy to that proposed by Kansas can also be considered during this arbitration, and the U.S. Supreme Court can formulate and mandate a remedy for future compliance, as it determines to be necessary. Finding for Kansas and finding in part for Nebraska and Colorado; finding in part against Nebraska.

Summary of Reasoning. The FSS sets forth a specific process for dispute resolution. *See* FSS, § VII. The FSS clearly states that the dispute resolution process applies to "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest" *See* FSS, § VII.A., ¶ 1. and ¶ 7. The remedy proposed by Kansas for future compliance with the Compact and the FSS is a proper subject for this arbitration provided it was first submitted to the RRCA (FSS, § VII.A., ¶ 1.), the RRCA was unable reach unanimous agreement or resolution (FSS, § VII.A., ¶ 7.), and Kansas desires to proceed with resolution by submitting to non-binding arbitration, unless otherwise agreed to by all States with an Actual Interest (*Id.*). As documented in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement), Kansas has followed all three procedural steps.

Kansas presented its proposed remedy for future Compact compliance and compliance with the FSS in its letter to Nebraska dated December 19, 2007. The mere act of presenting a proposed remedy for Nebraska's consideration did not impose the remedy, nor could Kansas impose any remedy on a coequal sovereign. However, once the facts are heard at hearing regarding Nebraska's alleged violations of the Compact and the FSS, and both Kansas' and Nebraska's proposed plans for future compliance are presented and considered, it is appropriate for the Arbitrator to recommend actions that may be necessary for future compliance. If this matter is eventually submitted to the Court, the Court certainly can impose equitable relief in the form of an injunction or in other form as determined to be necessary to enforce future compliance with the Compact and the FSS. However, in enforcing the FSS, the Court should not impose any greater burdens than what the States have consented to in the FSS.

Analysis. Kansas asserts that "Nebraska has shown itself to be incapable of meeting its obligations as set out in the Republican River Compact and the Final Settlement Stipulation" and therefore, "Nebraska needs to be told by the Court, and thus by the Arbitrator, what measures need to be taken in order to meet Nebraska's obligations." Kansas' Opening Brief on Threshold Legal Issues at 31. Nebraska asserts that "it is improper for Kansas to assume Nebraska will fail to comply with its obligations under the Compact" and that "Kansas seeks to dictate to Nebraska the means by which Nebraska must comply with the mandates of the Compact and the FSS to ensure against future Compact violations anticipated by Kansas." Nebraska's Opening Brief Re: Legal Issues at 64. Nebraska also asserts that it "has relentlessly pursued plans and programs designed to ensure Compact compliance" ¹⁴ Nebraska's Responsive Brief Re: Legal Issues at 10. Colorado offers the opinion that: "Although Nebraska has violated the terms of the Compact, there is no indication that such violations were willful or intentional." Colorado's Opening Brief on Legal Issues at 18.

Kansas and Nebraska are co-equal sovereigns, and neither can impose specific performance on the other. However, the States do not dispute the authority of the Court to formulate and impose a remedy to ensure future compliance with the Compact and the FSS, although Nebraska states that the remedy for future compliance with the Compact and the FSS proposed by Kansas in its letter to Nebraska dated December 19, 2007, "is no longer relevant to this Arbitration." Nebraska's Consolidated Reply Brief at 15. Given the propensity of Kansas and Nebraska to disagree on matters related to compliance with the Compact and the FSS, a compliance plan that would further "remove all causes, present and future, which might lead to controversies" ¹⁵ and reduce the likelihood for a series of future original jurisdiction actions before the Court is appropriate for this arbitration.

¹⁴ Nebraska's Opening Brief Re: Legal Issues contains numerous factual allegations regarding hydrologic conditions and Nebraska's efforts to ensure compliance with the Compact and the FSS. Kansas disputes many of these allegations. Because Nebraska's factual allegations were not presented under oath, were not subject to cross-examination, and the other States have not been afforded the opportunity to submit countervailing evidence, the Arbitrator has not considered or given any weight to the factual allegations of Nebraska in this decision.

¹⁵ Republican River Compact, Article I.

The Arbitrator notes that an attribute of the FSS that increases the likelihood of disputes between the States is that compliance with the Compact and the FSS is only determined after-the-fact, rather than during the course of each year. It may be appropriate to formulate a compliance plan that provides for taking certain actions during each year based on projected water supplies and projected uses of both surface water and groundwater by the States, together with after-the-fact compliance accounting and a system of credits and debits that carry forward, consistent with the Compact and the FSS. Such a plan may reduce the potential for future disputes regarding compliance and further “the most efficient use of the waters of the Republican River Basin” and “interstate comity.”¹⁶

Question 6:

If Nebraska’s alleged violations during both 2005 and 2006 are substantiated, is Kansas entitled to damages for both 2005 and 2006 or for 2006 only?

(Kansas’ Argument F., Nebraska’s Issue III.A.1.)

Decision: If Nebraska’s alleged violations during both 2005 and 2006 are substantiated, Kansas is entitled to damages for both 2005 and 2006, but not based on the methodology set forth by Kansas, i.e., not two times the average of the shortages from 2005 and from 2006. Nebraska’s compliance with the Compact in 2005 will be determined based on the evidence presented at hearing. Finding in part for Kansas and in part for Nebraska; finding in part against Nebraska and in part against Kansas.

Summary of Reasoning. By the plain wording of the FSS, the States waived “all claims against each other relating to the use of the waters of the [Republican River] Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002,” (FSS, § I.C.) but not “[w]ith respect to activities or conditions occurring after December 15, 2002” FSS, § I.D. Further, the “States agree[d] that this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States’ respective rights and obligations under the Compact.” *Id.* The States also agreed “to implement the obligations and agreements in this Stipulation in accordance with the schedule attached hereto as Appendix B.” FSS, § I.B. Appendix B of the FSS unambiguously sets the “First year Water-Short Year Administration compliance” as 2006, not 2005. The FSS also prescribes that “any Water-Short Year Administration year [is] treated as the second year of the two-year running average and using the prior year as the first year.” FSS, § V.B.2.e.i. The common meaning of a two-year running average is the average value for a parameter calculated by adding the value for that parameter in a given year to the value for that same parameter from the preceding year and dividing the sum by two. The calculations shown in Table 5C of the RRCA Accounting Procedures for determining Nebraska’s compliance during Water-Short Year Administration are wholly consistent with this meaning. Therefore, since Appendix B of the FSS sets 2006 as the first year for Water-Short Year Administration compliance, the only purpose for the 2005 calculations of

¹⁶ *Id.*

Nebraska's Computed Beneficial Consumptive Use above Guide Rock, Nebraska's Allocation from sources above Guide Rock, Nebraska's share of any unused portion of Colorado's Allocation, and credits for imported water, pursuant to § V.B.2.a. of the FSS and Table 5C of the RRCA Accounting Procedures, is for calculation of the corresponding two-year running averages for 2006. Nebraska's compliance with § V.B.2.a. of the FSS in 2005 would require calculation of two-year running averages using parameter values from 2004 and 2005, but is not relevant since the FSS plainly established 2006 as the first year for Water-Short Year Administration compliance.

While compliance with § V.B.2.a. of the FSS in 2005 is not required by the implementation schedule set forth in Appendix B to the FSS, this does not relieve Nebraska from any actual damages to Kansas resulting from noncompliance with the Compact in 2005.

Analysis. Kansas asserts that:

Applying the methodology for determining Nebraska compliance in a Water Short Year, as set out in Section V.B.2.e.i [of the FSS], to 2006, one must determine the two-year running average for the year 2006 and the prior year, 2005. The amount of violation for Water Short-Year 2006 is therefore that same amount doubled.

Kansas' Opening Brief on Threshold Legal Issues at 35.

Nebraska contends that:

The Implementation Schedule [in FSS, Volume 1 of 5, App. B, at B1], provides a list of dates by which various compliance mechanisms become applicable. The Implementation Schedule expressly identifies 2006 as the "First year Water-Short Year Administration compliance."

...

It is not possible to read into this language a requirement that Nebraska comply with the WSY Administration accounting in 2005.

Nebraska's Responsive Brief Re: Legal Issues at 28.

Nebraska further contends that "the FSS specifically was designed to allow Nebraska time to come into compliance with the new order of things, which included a new mandate to regulate table land wells. The provision of such a grace period was part of the bargained for exchange embodied in the FSS" *Id.*, at 29.

Neither Kansas nor Nebraska is correct. Kansas' interpretation of the provision in § V.B.2.e.i. of the FSS, which states "with any Water-Short Year Administration year treated as the second year of the two-year running average and using the prior year as the first year," is inconsistent with the plain wording of the provision and the plain meaning of "two-year running average." Nebraska's contention that there was to be a "grace period" directly contradicts § I.D. of the FSS which provides that: "With respect to activities or conditions occurring after December 15, 2002, the dismissal will not preclude a State from seeking enforcement of the provisions of the

Compact” There is no explicit mention of the “grace period” that Nebraska suggests was intended anywhere within the FSS or its appendices.

Using the hypothetical constructed by Kansas in its Opening Brief on Threshold Legal Issues at 35, together with the plain wording of the provision in § V.B.2.e.i. of the FSS and the plain meaning of “two-year running average,” if the 2005 accounting of allocation-less-beneficial-consumptive-use in Nebraska showed a negative 40,000 acre-feet, and the 2006 accounting showed a positive 20,000 acre-feet, the Water-Short Year violation for 2006 would be 10,000 acre-feet $((-40,000 + 20,000) / 2)$. Appendix B to the FSS does not provide for “Water-Short Year Administration compliance” prior to 2006 or “normal year compliance” prior to 2007. Therefore, any alleged Compact violations occurring after December 15, 2002, but before 2006 for “Water-Short Year Administration compliance” or 2007 for “normal year compliance” must be separately determined based on the evidence presented at hearing.

Question 7:

Is Nebraska’s issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years a proper subject for this arbitration?

(Kansas’ Argument G., Nebraska’s Issue III.A.2., Colorado’s Argument I.)

Decision: Nebraska’s issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years is not a proper subject for this arbitration at this time, since the issue has not been directly and fully submitted together with supporting materials to the RRCA. However, this issue can be addressed at hearing and in post-hearing briefs to the extent it must be addressed in considering Kansas’ proposed remedy, or other alternative remedies or plans that may be considered at hearing, for future compliance with the Compact and the Final Settlement Stipulation. Alternatively, since this issue was identified in Exhibit 4 to the Arbitration Agreement, once directly and fully submitted with supporting materials to the RRCA and if the RRCA is unable to resolve this issue, it would then be a proper subject as an issue in this arbitration. Finding in part for Kansas, Nebraska, and Colorado; finding in part against Kansas, Nebraska, and Colorado.

Summary of Reasoning. In Nebraska’s Opening Brief Re: Issue III.A.2., illustrative information is presented (*See* Table 1 in Nebraska’s Opening Brief) to show “the importance of providing Nebraska with a credit for damages paid for violations in 2006 (a WSY Administration year).” Nebraska’s Opening Brief Re: Issue III.A.2. at 8-9. While this information is helpful to the Arbitrator for context, there is no indication in the Arbitration Agreement or the States’ opening, responsive, or reply briefs that demonstrates Nebraska’s Issue III.A.2. was previously and specifically defined for the RRCA, that the type of supporting information presented in Table 1 of Nebraska’s Opening Brief regarding this issue was supplied to the RRCA, or that Nebraska designated a schedule for the RRCA to attempt resolution of this issue, as expressly required by § VII.A.6. of the FSS.

Nebraska's Issue III.A.2. may very well need to be addressed in a limited manner while considering the formulation of any plan for ongoing compliance with the Compact and the FSS that is determined to be necessary, and to the limited extent required to address other issues that have been properly submitted to but unresolved by the RRCA. To the limited extent necessary to address issues specifically set forth in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement), Nebraska's Issue III.A.1. can be considered in this arbitration. While the Arbitrator agrees with the principal of judicial economy in addressing related issues in a broader context, that principal cannot defeat the specific requirements of the FSS set forth in §§ VII.A.1. and 6. Therefore, if Nebraska desires to have its Issue III.A.2. fully addressed in this arbitration, Nebraska must first directly submit this issue to the RRCA as a separate issue with a specific definition, supporting materials, and a schedule for resolution.

Analysis. Nebraska asserts that it is entitled to have its issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years ("crediting issue") addressed in this arbitration because Exhibit 4 to the Arbitration Agreement executed by the States on October 23, 2008, specifically identifies the crediting issue as an issue to be arbitrated (Exhibit 4 at 3) and because ¶ 5. of § A. in the Arbitration Agreement provides:

The Arbitration is for the purpose of, and shall result in, the determination by the Arbitrator of the legal and factual issues set out in Exhibit 3 (Kansas issues) and Exhibit 4 (Nebraska's issues), as may be further refined by the States and the Arbitrator.

Arbitration Agreement at 1-2.

Nebraska further contends that the crediting issue arises directly from Kansas' submittal to the RRCA by letter dated February 8, 2008. *See* Nebraska's Opening Brief Re: Issue III.A.2 at 4-6.

Even though Kansas is a signatory to the Arbitration Agreement, which included Exhibit 4 identifying the crediting issue as an issue for arbitration, Kansas contends that:

Prior to October 21, 2008, Nebraska had never raised this issue with Kansas, and Nebraska has never presented this issue to the RRCA. Nebraska has never given Kansas a proposal as to how this matter could be resolved, and the matter has not been discussed by Nebraska and Kansas. Because Kansas has never seen Nebraska's proposal on how to resolve this matter, it is unknown whether a dispute even exists on this issue.

Kansas' Opening Brief on Threshold Legal Issues at 40.

Colorado states that: "Nebraska has the right to bring forth any issues for which it has followed the dispute resolution process [§ VII. of the FSS] and identified those issues within the Arbitration Agreement. Colorado's Opening Brief on Legal Issues at 7. Colorado also suggests that: "The significance that enforcement damages will have upon future compliance with the Final Settlement Stipulation is useful information to the states and is intrinsically related to the other issues that the states are already briefing." Colorado's Response Brief on Legal Issues at 20.

As already discussed for Question 1, the broad presumption that disputed matters not resolved by the RRCA pursuant to § VII.A. of the FSS may be submitted to non-binding arbitration, unless specifically excluded from arbitration, is consistent with the Court's explanation that:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steel Workers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, at 582-583.

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Id., at 584-585.

However, although the Arbitration Agreement executed by the States on October 23, 2008, specifically identified the crediting issue as an issue to be arbitrated, § VII.A.1. of the FSS approved as part of the Consent Decree unequivocally requires that: "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest, **shall first be Submitted to the RRCA.**" [*emphasis added*] Exhibit 1 to the Arbitration Agreement is a Resolution of the RRCA dated May 16, 2008, and identifies the disputes that have been addressed by the RRCA, as required by § VII.A.1. of the FSS, where no resolution was reached. Included in the disputes where no resolution was reached is Nebraska's submittal to the RRCA by Commissioner Dunnigan's letter dated April 15, 2008, which is attached to Exhibit 1 of the Arbitration Agreement. That letter sets forth nine issues Nebraska has identified as "fast-track" issues in accordance with § VII.A.3. of the FSS as follows: (1) Estimation of Beneficial Consumptive Use of Nebraska's Virgin Water Supply; (2) Division of Evaporative Loss from Harlan County Lake when Only One State Utilizes Reservoir Storage for Irrigation; (3) Non-Federal Reservoir Evaporation below Harlan County Lake; (4) Return Flow; (5) Haigler Canal Diversion/Arikaree Return Flows; (6) Haigler Canal Computed Beneficial Consumptive Use Calculations for Nebraska; (7) Arikaree Sub-basin Virgin Water Supply Calculations; (8) Discrepancies Between the Accounting Points for Surface Water Computed Beneficial Consumptive Uses and Ground Water Beneficial Consumptive Uses Used in the Accounting Procedures for Calculating Sub-basin Virgin Water Supplies and Beneficial Consumptive Uses; and (9) Riverside Canal Issues. None of these issues have any direct or intrinsic relationship with the crediting issue.

The requirement in § VII.A.1. of the FSS that any disputed matter or issue must first be submitted to the RRCA before it can be submitted to arbitration is unequivocal. Nebraska did not submit the crediting issue to the RRCA when it could have in its letter of April 15, 2008, even though it had received Kansas' proposed remedy for Nebraska's alleged violations of the FSS nearly 4 months earlier,¹⁷ from which Nebraska claims the crediting issue arises. Nebraska

¹⁷ Letter from David Barfield of Kansas to Ann Bleed of Nebraska, dated December 17, 2007.

has not subsequently provided documentation showing the crediting issue has been submitted to the RRCA and that the RRCA has not been able to resolve this issue. Therefore, the broad presumption afforded disputed issues eligible for arbitration, even those issues identified in Exhibit 4 of the Arbitration Agreement, does not apply. The crediting issue is specifically excluded by lack of submittal to the RRCA pursuant to § VII.A.1. of the FSS. Additionally, because Nebraska did not submit this issue to the RRCA when it clearly could have, the Arbitrator determines that the crediting issue does not fall within § VII. C. 1. of the FSS as one or more “unforeseen issues” that may be added “at the discretion of the arbitrator.”

The crediting issue may or may not have bearing on other issues that have been submitted to but unresolved by the RRCA. To the limited extent that the crediting issue must be considered to appropriately address issues specifically set forth in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement) the crediting issue will be considered in this arbitration. Otherwise, the crediting issue will be excluded unless that issue is fully submitted to the RRCA and the RRCA determines it is unable to resolve the issue during the pendency of this arbitration.

Dated: January 22, 2009



Karl J. Dreher
Arbitrator

CERTIFICATE OF SERVICE

I, Karl J. Dreher, hereby certify that I caused a copy of the foregoing Arbitrator's Final Decision on Legal Issues to be placed in the U.S. Mail, postage paid, on this 23rd day of January, 2009, addressed to each of the following:

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